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No. 05-1342 APR 18 2006

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In the Supreme Court of the United States

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Petitioner,

v.

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. 12 USC § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under State corporate law. The Comptroller of the Currency, by Rule 12 CFR 7.4006, made 12 USC § 484(a) equally applicable to State-chartered nonbank "operating subsidiaries" of national banks. Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc v Natural Resources Defense Council*?[1]

2. A national bank has been declared to be a national corporation in *Guthrie v Harkness*.[2] 12 CFR 7.4006 treats a State-chartered nonbank operating subsidiary of a national bank as equivalent to a national bank and, thus, as a national corporation. The Tenth Amendment to the United States Constitution is violated to the extent a statute permits the conversion of State corporations into federal ones in contravention of the laws of the place of their creation. *Hopkins v Federal Savings & Loan Ass'n v Cleary*.[3] Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, violate the Tenth Amendment to the United States Constitution?

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[1] *Chevron USA, Inc v Natural Resources Defense Council*, 467 US 837 (1984).

[2] *Guthrie v Harkness*, 199 US 148, 159 (1905).

[3] *Hopkins v Federal Savings & Loan Ass'n v Cleary*, 296 US 315, 335 (1935).

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OPINIONS BELOW

The December 19, 2005, opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Wachovia Bank N.A. v Watters*,[4] and is reprinted in the Appendix hereto at 1a-12a. The Court of Appeals denied rehearing in an unpublished order dated January 18, 2006, and is reprinted in the Appendix at p. 28a.

The opinion of the United States District Court, Western District of Michigan, Southern Division is reported at *Wachovia Bank v Watters*,[5] and is reprinted in the Appendix at 14a-25a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 19, 2005. An order denying petition for rehearing was entered January 18, 2006. This Court has jurisdiction over this petition pursuant to 28 USC § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const, Art VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

US Const, Amend X:

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[4] *Wachovia Bank N.A. v Watters*, 431 F3d 556 (6th Cir 2005).

[5] *Wachovia Bank v Watters*, 334 F Supp 2d 957 (WD Mich 2004).

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12 USC § 484(a)(National Bank Act) provides:

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 USC § 24 (Seventh) (in pertinent part):

Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 CFR 7.4006 provides:

Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

STATEMENT OF THE CASE

The Court of Appeals decision divests and preempts Michigan's historic and traditional right to exercise its police powers over State-chartered corporations through State legislation intended to protect the public from abusive and predatory mortgage lending practices. The result is not supported by any clear intent of Congress.

Plaintiffs Wachovia Bank, N.A. (Wachovia Bank) and its State-chartered operating subsidiary, Wachovia Mortgage Corporation (Wachovia Mortgage) filed a Complaint in the United States District Court, Western District of Michigan, Southern Division. Plaintiffs' Complaint sought declaratory and injunctive relief prohibiting the Commissioner of the Michigan Office of Financial and Insurance Services (OFIS) from enforcing Michigan's mortgage laws against Wachovia Mortgage. Plaintiffs contended that Michigan's mortgage laws as applied to Wachovia Mortgage were preempted by the National Bank Act and regulations promulgated by the Office of the Comptroller of the Currency (OCC) when Wachovia Mortgage became an operating subsidiary of Wachovia Bank, a national bank. Plaintiffs also alleged that Michigan regulatory attempts violated 42 USC § 1983.

The District Court had jurisdiction over this action pursuant to 28 USC § 1331 inasmuch as plaintiffs alleged claims arose under the United States Constitution and federal law.

Commissioner Linda A. Watters

Linda A. Watters is the duly appointed Commissioner of OFIS. In that capacity, Commissioner Watters administers and enforces Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act (MBLSLA)[6] and the Secondary Mortgage Act

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[6] Michigan Compiled Laws (MCL) 445.1651 *et seq.*

(SMA)[7]. Commissioner Watters exercises general supervisi and control over mortgage brokers, mortgage lenders, a mortgage servicers doing business in Michigan.[8] The MBLSl and the SMA exempt depository financial institutions fr regulation.[9] However, State chartered, non-bank operati subsidiaries of depository financial institutions are required register with OFIS if the bank does not maintain a main office a branch office in Michigan.

The MBLSLA gives authority to the Commissioner of OI to protect consumers from unfair, unsound, and abusive lendi practices. It was passed in 1987 to address unscrupulc predatory lending abuses that came to light in a scandal involv the AJ Obie-Diamond Mortgage Company, in which Michig borrowers were charged exorbitant fees and title to their prope was often clouded. Losses to over 1600 investors tota approximately $50 million dollars. In a subsequent crimi prosecution stemming from this scandal, the Michigan Court Appeals called it "the largest reported ponzi scheme in the hist of the State."[10]

Wachovia Bank, N.A.

Wachovia Bank, N.A. (Wachovia Bank) is a national ba whose main office is located in Charlotte, North Carolina.

Under federal law, a national bank is 1) a deposit institution that 2) has applied for and received a Certificate Authority (federal charter) from the OCC to conduct the busin of banking, 3) is eligible to become a Federal Reserve Mem Bank, and 4) is eligible to obtain federal deposit insurance fr

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[7] MCL 493.51 *et seq.*

[8] MCL 445.1661.

[9] MCL 445.1675(a).

[10] *People v Greenberg*, 176 Mich App 296, 299; 439 NW2d 336 (1989).

he Federal Deposit Insurance Corporation (FDIC). See 12 USC § 21-27, 221, 221a, 282, 1813(c)(2), 1814-16.

Wachovia Bank has no physical presence in the State of Michigan. It has no branch offices in Michigan, in contrast to the branch offices it has in some 17 other States throughout the country.

Wachovia Mortgage Corporation

Wachovia Mortgage Corporation (Wachovia Mortgage) is a State chartered, non-bank, operating subsidiary corporation of Wachovia Bank. It is a corporation organized under the laws of the State of North Carolina.

Wachovia Mortgage Corporation enjoys a separate and distinct corporate status from its parent, Wachovia Bank. Wachovia Mortgage is not a depository institution, has no federal banking charter, and is not eligible to become a federal reserve member bank or to obtain federal deposit insurance.

From March 27, 1997 to January 1, 2003, Wachovia Mortgage (previously named First Union Mortgage Corporation) had "registered" in Michigan to engage in the business of making first mortgage loans under the MBLSLA.[11]

Large national banks conduct mortgage lending business through separate and distinct operating subsidiary corporations in order to protect and insulate the parent bank from the risks of loss and liability created by mortgage loans.

Wachovia Mortgage holds a Certificate of Authority to transact business as a Foreign Profit Corporation in Michigan. Foreign non-bank corporations, like Wachovia Mortgage, are required to procure a Certificate of Authority in Michigan before

[11] MCL 445.1651 *et seq.*

transacting business.[12] Wachovia Mortgage and its predeces corporations have filed Michigan Annual Reports for Fore Profit Corporations with the Michigan Corporation Division si 1984. Wachovia Mortgage has never asserted an exemptior characterized itself as a "bank," in its filings with Michi Corporation Divisions, even though Michigan's Busin Corporation Act does not apply to banking corporations.[13]

Under the MBLSLA, Wachovia Mortgage is not requirec be "licensed." Rather, as a subsidiary of a depository institut (Wachovia Bank), Wachovia Mortgage is granted an except from licensure and need only "register" with the Commissione the Michigan Office of Financial and Insurance Services (OFI Wachovia Mortgage would not be required to register Wachovia Bank had a "main office" or a "branch office" Michigan.[14]

State authority over non-bank operating subsidiaries national banks is specifically limited. Under MBLSLA registrant like Wachovia Mortgage, unlike a licensee, is exer from 1) the license application process and extensive backgrou investigation of its officers, directors, shareholders, partners, affiliates; 2) proof of financial responsibility; 3) minimum worth requirements; 4) annual examination by the Ol Commissioner; 5) certain requirements regarding the transfer assigning of mortgages; and 6) complaint investigations, unl the complaint is not being adequately pursued by the appropri federal regulatory authority.[15]

Prior to January 1, 2003, Wachovia Mortgage was a whol owned subsidiary of Wachovia Corporation, a financial hold

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[12] MCL 450.2011, MCL 450.2015.

[13] MCL 450.1123(2).

[14] MCL 445.1656(1)(d).

[15] MCL 445.1656(2) and (3); MCL 445.1653 – MCL 445.1655; M 445.1679(1)(b) and (c); MCL 445.1663(2).

company which also owned Wachovia Bank, N.A. By letter dated April 3, 2003, Wachovia Mortgage notified OFIS that on January 1, 2003, Wachovia Mortgage became an operating subsidiary corporation of Wachovia Bank. Wachovia Mortgage declared in that letter that it would henceforth engage in its mortgage lending and servicing activities in Michigan "as authorized by regulations of the OCC." In claiming exemption from State regulation, Wachovia Mortgage asserted that ". . . these [Michigan's] registration requirements would not apply to a national bank and **therefore cannot be applied to an operating subsidiary of a national bank**." [bracket inserted] (emphasis added)

By letter dated June 23, 2003, Mark W. Weigold of OFIS, notified Wachovia Mortgage that without a registration pursuant to MBLSLA, it would no longer be authorized to conduct its mortgage lending activities in Michigan as of July 1, 2003, the date of expiration. After July 1, 2003, Wachovia Mortgage also began to engage in the business of making secondary mortgage loans in Michigan.

Michigan contends that the National Bank Act does not grant authority to the OCC to preempt State law through a regulation granting to State-chartered nonbank operating subsidiaries all of the immunities from State oversight that may be available to federally-chartered national banks.

In response to plaintiff's summary judgment motion, the district court issued an opinion which found that the limitation on visitorial power over national banks contained in 12 USC § 484(a) of the National Bank Act was "extended" by 12 CFR 7.4006, to State-chartered non-bank operating subsidiaries of national banks, and that the OCC's rule was entitled to deference under *Chevron*.[16] Plaintiffs' claim for attorney fees under 42 USC § 1983 was denied.

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[16] *Chevron*, 467 US at 837.

The United States Court of Appeals for the Sixth Cir affirmed, holding that the district court appropriately conduc its analysis pursuant to *Chevron* and concluded that regulations were within the OCC's authority and were reasonable interpretation of 12 USC § 484(a).

As a result, Michigan's MBLSLA and SLA regulating Wachovia Mortgage were declared preempted by 12 USC 484(a) and 12 CFR 7.4006 and Michigan was permaner enjoined from enforcing its State laws against Wacho Mortgage.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals erroneously granted *Chevr* deference to the OCC's regulation declaring that t National Bank Act preempts State law regulati State-chartered nonbank operating subsidiaries national banks in the area of mortgage lending. deferring to the OCC, the Court of Appeals decisio in conflict with the Tenth Circuit and decisions of t Court.

A. The OCC's preemptive interpretation of t National Bank Act as expressed in 12 CFR 7.40 does not qualify for *Chevron* deference because USC § 484(a) is clear and unambiguous, and t OCC's regulation therefore violates t unambiguously expressed intent of Congress.

The statutory anchor upon which this whole controversy re is 12 USC § 484(a), which provides that "no national bank sh be subject to any visitorial powers except as authorized by fede law." Visitorial powers include the examination and inspecti of a national bank's books and records. The OCC, by adopting CFR 7.4006, has declared its belief that the exclusive visitor powers it has over national banks should be extended to the Sta chartered nonbank operating subsidiaries of national banks. CFR 7.4006 provides that: "Unless otherwise provided Federal law or OCC regulation, State laws apply to national ba

operating subsidiaries to the same extent that those laws apply to the parent national bank."

By its express terms, 12 USC § 484(a) applies only to "national banks." The words are clear and unequivocal. They should be held to mean what Congress says they mean. Congress has defined a "national bank" in the National Bank Act. A "national bank" is a depository institution that (1) has applied for and received a charter from the OCC to conduct the business of banking, (2) is eligible to become a Federal Reserve member bank, and (3) is eligible to obtain federal deposit insurance from the FDIC.[17] Wachovia Mortgage has none of these indicia.

A "national bank" cannot come into existence without complying with the provisions of the national bank laws. Not only does it owe its existence to these laws, but it also is specifically governed by them in all aspects, including its corporate powers.[18] An operating subsidiary incorporated by a State government is not a national bank. It is neither created pursuant to the national bank laws nor is it governed by these laws for purposes of corporate governance. It does not need a certificate from the OCC to conduct business, and it cannot become a member of the Federal Reserve System.

Chevron[19] does not permit the OCC to ignore the statutory definition of "national bank" and to invent a new definition that expands its preemptive reach under the National Bank Act.[20] *Chevron* says that if the law passed by Congress is clear and

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[17] 12 USC §§ 21-24, 26, 27, 221, 221a, 282, 501a, 1814 and 1815.

[18] 12 USC § 24.

[19] *Chevron*, 467 US at 842-843.

[20] *See* Arthur E. Wilmarth, Jr., *Preemption – OCC v Spitzer: An Erroneous Application of Chevron That Should Be Reversed*, BNA's Banking Report, Vol. 86, No 8, 379 (Feb. 20, 2006), and Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Annual Review of Banking and Financial Law 225 (2004).

unambiguous, it must be applied as written. Under the first s of *Chevron*, a reviewing court must determine "whether Congr has directly spoken to the precise question at issue" and, if so, Court must reject an agency interpretation of a statute tha contrary to the unambiguously expressed intent of Congress[21]. however, the Court determines that "Congress has not direc addressed the precise question at issue," the court must deci under the second step of *Chevron* whether "the agency's answe based on a permissible construction of the statute.[22] This Cour *Chevron* also stated[23]:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citations omitted.]
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> ***
>
> If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

In applying "step one" of *Chevron* the District of Colum Circuit has held that a reviewing court must "evaluate the statu clarity [itself], giving no deference to the agenc interpretation."[24]

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[21] *Chevron*, 467 US at 843.

[22] Chevron, 467 US at 842-43. In a manner similar to the decision bel Chevron deference to 12 CFR 7.4006 was also erroneously applie *Wachovia Bank v Burke*, 414 F3d 305 (2d Cir 2005), petition for cert filed, 05-431 (US, Sept. 30, 2005); *Wells Fargo Bank, NA v Bou* 419 F3d 949 (9th Cir 2005), *National City Bank of Indiana v Turnba* 367 F Supp 2d 805 (D Md, 2005), appeal pending, No 05-1647 (4th Cir).

[23] *Chevron*, 467 US at 843, note 9.

[24] *AFL-CIO v Federal Election Comm'n*, 333 F3d 168, 173 (DC Cir 200

In *ACLU v FCC*,[25] the same Court struck down a rule adopted by the Federal Communications Commission that altered the statutory definition of "basic cable service" and thereby greatly increased the FCC's power to preempt the rate-setting authority of local communities. The Court held that "Congress has spoken directly and specifically by providing a definition of the exact term that the [FCC] now seeks to redefine."[26] The Court emphasized that its scrutiny was considerably heightened by the fact that the agency sought to expand a key jurisdictional term and thereby extend its power to preempt local authorities[27]:

> Thus, the definition of "basic cable service" sets the parameters of the respective jurisdictions of local franchising authorities and the FCC. The fact that construction of the statutory term directly impacts such jurisdictional determinations should, in our view, be factored into a proper analysis of the statutory issue we face. *Cf. Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 106 S. Ct. 681, 88 L. Ed. 2d 691 (1986), n32 ("When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical that Congress did not speak to such a fundamental issue"). That issue may be simply stated. Does the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with the definition of that very term contained in the Act itself? The question, we believe, answers itself.

In *Lamie v United States Trustee*,[28] this Court stated:

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[25] *ACLU v FCC*, 823 F2d 1554 (DC Cir 1987).

[26] *ACLU v FCC*, 823 F2d at 1570.

[27] *ACLU v FCC*, 823 F2d at 1567.

[28] *Lamie v United States Trustee*, 540 US 526, 534 (2004).

> The starting point in discerning Congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the court's--at least where the disposition required by the text is not absurd--is to enforce it according to its terms. [Citations omitted]

In *Board of Governors of the Federal Reserve Systen Dimension Financial Corp*,[29] this Court struck down a regulat of the Federal Reserve Board ("FRB") which sought to redef the statutory definition of "bank" set forth in the Bank Hold Company Act ("BHC Act"). In that case, the FRB argued t "nonbank banks" were "functionally equivalent to 'banks'" jus the OCC has claimed in 12 CFR 7.4006 that operat subsidiaries are "functionally identical to their parent [natior banks." In *Dimension* the FRB contended that its redefinitior "bank" was necessary to accomplish the "plain purpose" of BHC Act, just as the OCC argues here that its redefinition "national bank" is necessary to carry out principles of National Bank Act. In *Dimension*, however, this Court held th federal agency has no authority to expand the limits of authority by altering a jurisdictional term set forth in governing statute, regardless of how strongly the agency belie in its policy arguments.[30]

Likewise, in *Minnesota v Fleet Mortgage Corp*,[31] the Cc rejected the OCC's claim that "operating subsidiaries functionally equivalent to a department or division of the b itself" and therefore should be treated as "banks" under § 3 of Federal Deposit Insurance Act.[32] The Court pointed out that

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[29] *Board of Governors of the Federal Reserve System v Dimension Finar Corp*, 474 US 361 (1986).

[30] *Board of Governors v Dimension*, 474 US at 368, 373, 374.

[31] *Minnesota v Fleet Mortgage Corp*, 181 F Supp 2d at 995 (D Minn 20

[32] 12 USC § 1813.

lefinition of "bank" in 12 USC § 1813(a)(1)(A) "does not include ıational bank operating subsidiaries."[33] The Court refused to lefer to the OCC's position that operating subsidiaries are equivalent to banks, because "there is no ambiguity present in this lefinition [of 'bank']. The definition of "bank" identified by Congress simply does not include subsidiaries of banks."[34]

Congress has made clear that operating subsidiaries must be treated as "affiliates" under 12 USC § 221a(b). The unambiguous terms of 221a(b) define "affiliate" to include "any corporation" controlled by a national bank. This statutory definition of "affiliate" clearly includes operating subsidiaries, because they are corporations controlled by National banks.[35]

Under 12 USC §§ 161(c) and 481, the OCC may obtain reports from and examine "affiliates" in order to assess a national bank's relationships with its affiliates. In sharp contrast to 161(c) and 481, 12 USC § 484(a) limits the exercise of visitorial powers only with respect to national banks and does not mention "affiliates." Similarly, 161(c) and 481 do not place any restriction on the states' authority to regulate affiliates.

12 USC § 484 was most recently amended on January 12, 1983 by P.L. 97-457, § 23a, 96 Stat. 2510. At that time, Congress had an opportunity to amend 12 USC § 484 to limit the exercise of visitorial powers over "affiliates" (including operating subsidiaries) which have been part of the national bank laws since the Banking Act of 1933.[36] The OCC first adopted its rule allowing national banks to establish operating subsidiaries in 1966. Yet, Congress did not include language referring to

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[33] *Minnesota v Fleet Mortgage*, 181 F Supp 2d at 998.

[34] *Minnesota v Fleet Mortgage*, 181 F Supp 2d at 1000.

[35] See 12 CFR 5.34(e)(2)

[36] *See* S Rep No 77, 73d Cong., 1st Sess. 10 (1933), (declaring that Congress intended "[t]o separate as far as possible national . . . banks from affiliates of all kinds").

operating subsidiaries or other affiliates in the 1983 amendm to 12 USC § 484, or in the preceding 1982 amendment to 12 U § 484 (P.L. 97-320, § 412, 96 Stat. 1521). Congress is presum to have acted purposefully when it omits language in c statutory provision that is included in another.[37] Sections 161(481 and other provisions of the national banking la demonstrate that Congress has made a careful distinction betw a national bank and an affiliate like an operating subsidiary t carries on particular aspects of the banking busines Subsidiaries controlled by national banks are separat incorporated entities and have a separate legal status from th parent banks.

Under traditional rules of statutory construction, it must presumed that Congress' omission of any reference to "affiliat in 12 USC § 484(a) means that Congress did not intend to exte the preemptive scope of that statute to reach State-charte nonbank operating subsidiaries.[39] In fact, the OCC did not cla that operating subsidiaries were immune from state regulati until it adopted 12 CFR 7.4006 in 2001, long after the most rec amendments to 12 USC § 484.

The OCC does not possess any independent power to preen State law. And the OCC is not free to preempt Michigan's l under the guise an "incidental power" under 12 USC § (Seventh) by creating a preemptive regulation that it decide wants. Incidental powers are those that are necessary to carry the business of banking – but they must be within the limitati prescribed by the National Bank Act. An incidental power m find its genesis from an express power. If there is no ne between an incidental activity and an express power, the activ is not authorized as an incidental power.

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[37] *Chicago v Environmental Defense Fund*, 511 US 328, 338 (1994).

[38] 12 USC §§ 52 & 221a(b); *See* S Rep No 77, 73d Cong., 1st Sess. 10 (19 (declaring that Congress intended "[t]o separate as far as possible national banks from affiliates of all kinds")

[39] *See Keene Corp v United States*, 508 US 200, 208 (1993).

The right to interpret the "incidental powers" of a national bank does not give the OCC any authority to treat an operating subsidiary as the functional equivalent of a national bank. As this Court has observed, 12 USC § 24 (Seventh), "by its terms applies only to banks" while [o]rganizations affiliated with banks . . . are dealt with by other sections of the 1933 Act."[40] While the term "incidental powers" may be broad, it must be interpreted in light of other provisions of the national banking law. In *American Land Title Ass'n v Clarke*,[41] the Second Circuit determined that § 24 (Seventh) must be interpreted in light of 12 USC § 92, which imposes specific limitations on the insurance activities of national banks. Similarly, Congress has provided specifically for the governance of affiliates, including operating subsidiaries, in 12 USC §§ 221a(b), 161(c) and 481. Congress has carefully separated national banks from their affiliates (including operating subsidiaries), and the general incidental powers of national banks cannot justify the OCC's effort to obliterate the distinction established by Congress between national banks and their affiliates.

For example in *First National Bank in St. Louis v Missouri*,[42] this Court held that national banks did not possess any "incidental power" to establish branches under the predecessor statute to § 24 (Seventh). The Court pointed out that the statutes expressly addressing branch banking allowed national banks to operate branches only in very limited circumstances. The Court then held that "it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power."[43]

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[40] *Board of Governors v Investment Company Institute*, 450 US 46, 58-59, n. 24 (1981).

[41] *American Land Title Ass'n v Clarke*, 968 F2d 150, 157 (2d Cir 1992); *cert den* 508 US 971.

[42] *First National Bank in St. Louis v Missouri*, 263 US 640 (1924).

[43] *First National Bank in St. Louis v Missouri*, 263 US at 656-58 (quote at 658).

This Court has also made clear that a careful examinatio congressional intent is required in every case where a fed agency claims authority to issue regulations preempting S law. The Court declared in *Louisiana Public Service* that "[t critical question in any pre-emption analysis is always whe Congress intended that federal regulation supersede State law Accordingly, while a specific statutory statement of congressi intent to preempt State law is not necessary, the OCC's regula cannot be upheld unless the governing statutes indicate Congress contemplated the result advocated by the OCC in CFR 7.4006. This Court has further emphasized tha preemptive agency regulation is invalid unless Cong delegated authority that would permit the agency to override S laws, holding that "an agency literally has no power to act, alone pre-empt the validly enacted legislation of a sover State, unless and until Congress confers power upon it,"[45] and agency may not bootstrap itself into an area in which it ha jurisdiction by repeatedly violating its statutory mandate."[46]

This Court has applied a general presumption aga preemption in fields involving traditional State regulation.[4 cases where federal law is alleged to preempt an area traditional state concern, this Court has said that "congressi intent to supersede State laws must be 'clear and manifest That clear and manifest intent does not exist in this case.

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[44] *Louisiana Public Service Commission v FCC*, 476 US 355,369 (198

[45] *Louisiana Public Service Commission v FCC*, 476 US at 374.

[46] *SEC v Sloan*, 436 US 103, 119 (1978).

[47] *Medtronic v Lohr*, 518 US 470, 475, 484-485 (1996).

[48] *English v General Electric Co*, 496 US 72, 79 (1990).

B. The OCC's preemptive interpretation of the National Bank Act is not based on a permissible construction of 12 USC § 484(a).

12 CFR 7.4006 is not based on a permissible construction of the national bank laws. It is impermissible because it preempts historic police powers of the State of Michigan without any clear and manifest expressed intent by Congress to do so. It is also an impermissible construction of the national bank laws because it ignores fundamental concepts of corporate law, including the legal separation between a parent corporation and its subsidiaries. Finally, it is impermissible because it is contrary to the legal foundation upon which the national bank laws were drafted, which requires a national bank to be a national corporation formed pursuant to federal law.

The OCC's regulation eliminates any ability of the State of Michigan to regulate a State-chartered nonbank operating subsidiary of a national bank conducting a mortgage business within Michigan. Historically, pursuant to their police powers, the States have been able to regulate the corporations which operate within their boundaries.[49] A court engaged in a preemption analysis must assume that the historic police powers of a State are not to be preempted by federal laws unless it is the "clear and manifest purpose of Congress" to do so.[50] The power of the federal government to preempt State laws is an extraordinary power. When analyzing the OCC's authority to promulgate 12 CFR 7.4006, this Court must assume that Congress does not exercise its power to preempt State laws lightly.[51]

Congress has recognized that Michigan, and other States, have long exercised police powers to protect consumers,

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[49] *E.g.,CTS Corpv Dynamics Corp of America,*481 US 69 (1987); *Union Brokerage Co v Jensen,* 322 US 202 (1944).

[50] *Rice v Santa Fe Elevator Corp*, 331 US 212, 230 (1947).

[51] *Gregory v Ashcroft*, 501 US 452, 460 (1991).

businesses and communities from abusing practices involv providers of financial services, including national banks. In 19 when Congress adopted the Riegle-Neal Interstate Banking Branching Efficiency Act of 1994,[52] the Conference Report the Act declared:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .
>
> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles. H.R. Rep. No. 103-651 (Conf. Rep.), at 53 (1994), reprinted in 1994 U.S. Code Cong. & Ad. News, 2068, 2074.

The National Bank Act was not intended to divest all St authority over national banks. Indeed, from its earliest decisi involving the NBA, the U.S. Supreme Court has recognized a upheld the applicability of State laws to national banks numerous cases. In 1870, the Supreme Court rejected a ban preemption challenge to a State's collection of a bank shares t declaring that national banks "are subject to the laws of the St and are governed in their daily course of business far more by laws of the State than of the nation . . . . It is only when the St law incapacitates the banks from discharging their duties to government that it becomes unconstitutional."[53] In *McClella*

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[52] Riegle-Neal Interstate Banking & Branching Efficiency Act of 1994, Pu No 103-328, 108 Stat 2338.

[53] *National Bank v Commonwealth*, 76 US 353, 361-62 (1870).

Chipman,[54] this Court rejected a bank's assertion that "national banks in virtue of the NBA are entirely removed, as to all their contracts, from any and every control by the State law," holding instead that State laws govern the business transactions of national banks except in areas where Congress expressly preempts State law or State law would impair the banks' efficiency, frustrate the purpose for which they were created, or amount to undue State interference in carrying out their duties imposed by federal law. Other Supreme Court decisions affirm the principle that national banks remain subject to many State laws.[55] And there is nothing to indicate that Congress intended to totally preempt Michigan's authority to regulate a State-chartered nonbank operating subsidiary of a national bank.

A parent corporation and its subsidiary are distinct legal entities.[56] During the promulgation of 12 CFR 7.4006, the OCC stated that operating subsidiaries are "in essence, incorporated

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[54] *McClellan v Chipman*, 164 US 347, 359 (1896).

[55] *See e.g., Davis v Elmira Savings Bank*, 161 US 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating State laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purpose of Congressional legislation."); *First National Bank in St. Louis v Missouri*, 263 US 640, 656 (1924) (National banks "are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."); *Anderson National Bank v Luckett*, 321 US 233, 244-54 (1944) ("National banks are subject to State laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions," holding that a State statute administering abandoned deposit accounts did not "unlawful[ly] encroach[h] on the rights and privileges of national banks."); *Franklin National Bank v New York*, 347 US 373, 378 n 7 (1954) ("National banks may be subject to some State laws in the normal course of business if there is no conflict with federal law."). More recently, in *Atherton v FDIC*, 519 US 213, 222-23 (1997), the Supreme Court reaffirmed the principle that "federally chartered banks are subject to State law," based on its earlier decisions.

[56] *Dole Food v Patrickson*, 538 US 468, 474 (2003); *United States v Bestfoods*, 524 US 51, 61 (1998).

departments or divisions of the [parent] bank."[57] It is impermissible construction of the national bank laws to treat operating subsidiary as a mere division of a national bank direc contrary to fundamental corporate law throughout the Uni States. The national banking laws recognize affiliates, includ operating subsidiaries, as separate and distinct legal entities fr a national bank.[58] Accordingly, the OCC's attempt to blurr legal distinction between a State-chartered nonbank operat subsidiary and its parent national bank by promulgating 12 C 7.4006 is contrary to the national banking laws which must g the OCC its authority to issue regulations.

The Michigan Business Corporation Act[59] was enac January 1, 1973. Chapter 10 of the Michigan Busin Corporation Act pertains to the regulation of foreign corporati such as Wachovia Mortgage Corporation. Michigan a regulates domestic and foreign corporations pursuant to mortgage laws such as the MBLSLA and the SMLA. Autho to regulate these entities under these acts is pursuant to traditic police powers of the sovereign State of Michigan.

Wachovia Mortgage did not come to Michigan and apply a certificate of authority to transact its business claiming it wa national bank. It did not claim it was a national bank whe filed its 2005 annual report with Michigan or in any ot previous year. If it could have shown it was a national bank, Michigan Corporations Division would have been divested jurisdiction because the Michigan Corporation Act does not ap to banks.[60] When Wachovia Mortgage was granted a certific of authority to do business in Michigan under the Michi Business Corporation Act, it became authorized to transac Michigan any business of the character set forth in its applicat

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[57] 66 Fed Reg 34788 (2001).

[58] 12 USC § 221a(b)(1, 52, 161)(c).

[59] MCL 450.1101 *et seq.*

[60] MCL 450.1123.

which a domestic corporation formed under this act may lawfully transact.[61] Large national banks make a business judgment to conduct their mortgage lending business through operating subsidiaries in order to protect the parent banks from the risks of loss and liability created by mortgage loans.[62] If a State-chartered nonbank operating subsidiary was actually the functional equivalent of national bank - which it is not, the operating subsidiary would not qualify under Michigan's corporation law to receive a certificate of authority as a foreign corporation. This would effectively eliminate the corporate separation protections that have encouraged national banks to conduct business through operating subsidiaries. It is unlikely that Wachovia Bank would claim it is legally indistinguishable from its operating subsidiary if Wachovia Bank learned that its subsidiary had engaged in mortgage fraud, predatory lending, breaches of fiduciary duty, or other unlawful activities resulting in potential liability. As the Supreme Court said in *First National Bank v Walker Bank & Trust*[63]: "It is a strange argument that permits one to pick and choose what portions of the law binds him." Wachovia Bank cannot have it both ways. It cannot claim to be separate from Wachovia Mortgage for legal liability purposes, and, at the same time, to be identical to Wachovia Mortgage for preemption purposes.

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[61] MCL 450.2016; MCL 450.1107(1).

[62] *See Wilmarth, OCC's Preemption Rules, supra* note 23, at 359 (quoting amicus brief filed by the American Bankers Ass'n et al.

[63] *First National Bank v Walker Bank & Trust*, 385 US 252, 261 (1966).

C. The Court of Appeals decision is in conflict w the Tenth Circuit in *Colorado Public Utilit Commission v Harmon*, fails to consider t Court's decision in *Smiley v Citibank* and t District of Columbia Circuit decision *American Bar Association v Federal Tra Commission*, and is not consistent with t Court's recent decision in *Gonzales v Oreg*

Citing *NationsBank v Variable Annuity Life Insura Company*,[64] the Court of Appeals viewed this case through framework of *Chevron*, stating that if the Comptroll interpretation is reasonable, it must defer to its construction of statute.[65] However, neither *NationsBank* nor *Chevron* itself w preemption cases.

The preemptive effect of a statute is a legal question wit the expertise of the courts – not a federal agency. In *Colora Public Utilities Comm v Harmon*,[66] the Court acknowled deference generally in regard to an agency's interpretation statutes and regulations. However, in deciding to **independen** review the legal issue of preemption of federal regulation o State regulations, the Court stated that "a preempt determination involves matters of law – an area more within expertise of the courts" than within the expertise of the agenc

While this Court has not ruled definitively on the questior whether the *Chevron* doctrine applies to preempt determinations, its decision in *Smiley v Citibank* is instructive should have been considered by the Sixth Circuit. There, Court considered the "substantive" (as opposed to preempti

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[64] *Nationsbank v Variable Annuity*, 513 US 251 (1995).

[65] *Wachovia Bank, N.A. v Watters*, 431 F3d at 562.

[66] *Colorado Public Utilities Commission v Harmon*, 951 F2d 1571 (10th 1991.

[67] *Colorado Public Utilities Comm v Harmon*, 951 F2d at 1579.

meaning of a statute, as distinguished from the question of whether a statute is pre-emptive. In deciding whether the OCC reasonably interpreted the term "interest" contained in 12 USC § 85 to include late-payment fees, this Court applied the "ordinary rule of deference" under *Chevron* in determining the substantive meaning of the federal statute.[68] However, as to the applicability of *Chevron* on the question of whether a federal statute is preemptive, the Court stated that:

> We may assume (without deciding) that the latter question [question of whether a statute is preemptive] must always be decided *de novo* by the Courts.[69]

The Court of Appeals did not decide this preemption case *de novo* but instead, granted deference to the OCC's regulation under "step 2" of *Chevron*.

This Court, in *Gonzales v Oregon,* rejected an open-ended claim for deference by the United States Attorney General. In holding that the Controlled Substance Act (CSA) does not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under State law permitting the procedure, the Court held[70]:

> *Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.
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> ***

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[68] *Smiley v Citibank (South Dakota) N.A.*, 517 US 735, 740 (1996).

[69] *Smiley v Citiban (South Dakota), N.A.*, 517 US at 744 (emphasis added; bracket inserted).

[70] *Gonzales v Oregon*, ___US___; 126 S Ct 904, 916, 921, 923, 925; 163 L Ed 2d 748 (2006) (citations omitted).

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes."
>
> * * *
>
> [T]he statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"
>
> * * *
>
> Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.

In *American Bar Association v Federal Trade Commissi* the District of Columbia Circuit refused to give *Chevi* deference to a regulation of the Federal Trade Commission t attorneys engaged in the practice of law were "financ institutions" subject to the customer privacy provisions of Gramm-Leach-Bliley Financial Modernization Act. The Cour *ABA* rejected the FTC's "attempted turf expansion" and assertion that its regulation was entitled to step-two defere under *Chevron* when the federal statute does not expressly neg the existence of a claimed administrative power.

> Federal law "may not be interpreted to reach into areas of State sovereignty unless the language of the federal

> law compels the intrusion." [otherwise put] . . . "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"
>
> As we have often cautioned, "to suggest, as the [Commission] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." Plainly, if we were "to *presume* a delegation of power" from the absence of "an express *withholding* of such power, agencies would enjoy virtually limitless hegemony. . . .[71]

Thus, both *Gonzales* and *American Bar Association* establish that mere statutory ambiguity is not sufficient to warrant deference under *Chevron* "step two," especially when a federal agency seeks to deny or severely restrict the right of a State to exercise its police powers to protect the public interest, as occurred in this case. The Court of Appeals concluded that "Congress has not spoken precisely on the issue."[72] Yet, the Court wrongly applied *Chevron* deference to allow the OCC to preempt all state regulation of a large class of State-charted corporations. In view of *Gonzalez* and *ABA v FTC* the Court of Appeals clearly erred in granting deference to the OCC's regulation.

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[71] *American Bar Association v Federal Trade Commission*, 430 F3d 457, 471-472, 468 (DC Cir 2005). The District of Columbia Circuit's decision was issued on December 6, 2005, only thirteen days before the Sixth Circuit issued its initial opinion in this case, and no party brought that decision to the Sixth Circuit's attention.

[72] *Wachovia Bank, N.A. v Watters*, 431 F3d at 561.

II. 12 CFR 7.4006 intrudes on State sovereignty violation of the Tenth Amendment of the United Sta Constitution in an area of consumer protection critical importance to the States.

The Court of Appeals decision exempts State-charte nonbank operating subsidiaries of national banks from Michig consumer protection regulation and enforcement under th mortgage laws. 12 CFR 7.4006 essentially federalizes a St corporation by converting it into an instrumentality of fede law. Such an effort is a significant intrusion on State sovereig and is a violation of the Tenth Amendment[73] by co-opting a ability of a State to regulate the State corporation to protect citizens.

In promulgating 12 CFR 7.4006 the OCC has abolished distinction between a national bank, a creation of federal law, a a State corporation, a creature of State law. Without question, risk aversion aspects of the separate and distinct legal entities national bank and its operating subsidiary convey a signific advantage to the parent bank. In fact, this legal protection fr risk directly results from the fact that the operating subsidiary separate legal entity, created under State law, from the nationa chartered bank parent. Such protection would not exist if operating subsidiary were merely "a division or department" the national bank. "It is a general principle of corporate l deeply 'ingrained in our economic and legal systems' that a par corporation . . . is not liable for the acts of its subsidiary Federal statutes are presumed to incorporate this fundamer tenet of corporate law, and "congressional silence" does not all a court to "reject this bedrock principle."[75]

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[73] US Const, Amend X.

[74] *United States v Bestfoods*, 524 US 51, 61 (1998).

[75] *United States v Bestfoods*, 524 US 51, 61-62 (1998); *accord, Dole Food v Patrickson*, 538 US 468, 474-76 (2003).

Any question regarding the power of a federal agency to intrude on a State's sovereignty can, and should, be avoided wherever possible. In *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*,[76] this Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of Congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional State power.

The District of Columbia Circuit has held that "the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference,"[77] and that this limitation on deference applies at either "step one" or "step two" of the *Chevron* analysis.[78]

12 CFR 7.4006 significantly intrudes upon the States' ability to control entities created by the States. In *Hopkins Federal Savings & Loan Ass'n v Cleary*, this Court found that a portion of the Home Owners' Loan Act violated the Tenth Amendment "to the extent that it permits the conversion of State associations into federal ones in contravention of the laws of the place of their creation."[79] In so holding, this Court stated that: "It extends in

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[76] *Solid Waste Agency of Northern Cook Country v United States Army Corps of Engineers*, 531 US 159, 172-173 (2001)(citations omitted).

[77] *University of Great Falls v NLRB*, 278 F3d 1335, 1340-41 (DC Cir 2002).

[78] *AFL-CIO v Federal Election Comm'n*, 333 F3d 168, 175, 179-80 (DC Cir 2003).

[79] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

that view to moneyed corporations generally and even to oth corporations, if Congress chooses to convert them into creatu of the federal government."[80]

In addition, "[n]o principle of corporation law and practic more firmly established than a State's authority to regul domestic corporations, including the authority to define voting rights of shareholders."[81] In addition, this Court h further affirmed that each State may enact and enforce la designed to "assur[e] responsibility and fair dealing on the par foreign corporations coming into a State."[82] Both this Court a Congress have recognized that States have a heightened inter in regulating corporations that provide financial services, beca "banking and related financial activities are of profound lo concern. [S]ound financial institutions and honest financ practices are essential to the health of any State's economy and the well-being of its people."[83]

Despite this consistent recognition of State authority regulate corporate activities – particularly those involv financial services – § 7.4006 divests the States of all power regulate State-chartered corporations that are owned by natio banks. Under that interpretation, 12 CFR 7.4006 bars **all** St officials – including State Attorneys General and State bank commissioners – from regulating State-chartered operat subsidiaries in any way. Wachovia and the OCC cannot poin any federal statute granting the OCC explicit power to destroy States' authority over this impo tant category of State-charte corporations.[84]

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[80] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[81] *CTS Corp v Dyamics Corp of Americ*, 481 US 69, 89 (1987).

[82] *Union Brokerage Co v Jensen*, 322 US 202, 210-11 (1944).

[83] *Lewis v BT Investment Manager, Inc*, 447 US 27, 38 (1980); *accord*, Rep No. 103-651 (Conf Rep), at 53 (1994), *reprinted in* 1994 USCCAN 2(2074.

[84] In 2004, a congressional committee criticized the OCC's efforts to pree the authority of State officials to enforce consumer protection laws aga

The practical effect of 12 CFR 7.4006 is to transform State-chartered operating subsidiaries into "creatures of the federal government" without the permission of the chartering States.[85] By doing so §7.4006 clearly infringes on sovereign State interests protected by the Tenth Amendment.[86] Consequently, § 7.4006 has no claim to deference under *Chevron*, because (1) § 7.4006

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national banks and their operating subsidiaries. The committee recognized the important contributions made by State officials in protecting consumers against abusive financial practices. The committee also questioned whether the OCC possessed sufficient resources to enforce consumer protection laws, in view of the agency's "primary mission of ensuring the safety and soundness of the national bank system":

> The new [OCC] rules necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 States from a single customer assistance center. . . . There are currently only 40 full time staff members allocated for these tasks at the OCC. In contrast, according to the Conference of State Bank Supervisors, State banking agencies and State attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance. In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.
>
> In order to fulfill this vastly increased portfolio of regulatory responsibilities, the Committee is concerned that the OCC will be forced to utilize funds designated for other purposes to engage in consumer law enforcement activities that typically have been undertaken by the States. . . . The Committee is concerned that such action could weaken the OCC's ability to carry out its primary mission of ensuring the safety and soundness of the national bank system and implementing other critical Congressional mandates in Federal law.

House Comm. on Financial Services, "Views and Estimates of the Comm. on Financial Services on Matters to Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005, 108th Cong., 2d Sess. 16 (Comm. Print, Feb. 25, 2004). *See also* Wilmarth, OCC's Preemption Rules, supra note 23, at 314-16, 348-56 (contending that State officials have been far more effective than the OCC in protecting consumers against predatory lending and other abusive financial practices).

[85] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335.

[86] *Hopkins Federal Savings & Loan Ass'n v Cleary*, 296 US at 335-40.

"alters the federal-State framework by permitting fede encroachment upon a traditional State power" and (2) neitl Wachovia nor the OCC can show "a clear indication tl Congress intended that result"[87] Even the Sixth Circuit concluc that Congress has not spoken precisely on the issue. preempting Michigan's laws as to State-chartered nonba operating sub idiaries of national banks, the OCC's regulati exceeded the agencies statutory authority and must not allowed to stand.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted

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Dated: April, 2006

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[87] *Solid Waste Agency of Northern Cook County v United States Army C of Engineers*, 531 US at 172-73.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WACHOVIA BANK, N.A. and WACHOVIA MORTGAGE CORPORATION,

Plaintiffs-Appellees,

No. 04-2257

v.

LINDA A. WATTERS, Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Michigan at Lansing.
No. 03-00105—Robert Holmes Bell, Chief District Judge.

Argued: October 27, 2005

Decided and Filed: December 19, 2005

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: E. John Blanchard, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Lori McAllister, DYKEMA GOSSETT, Lansing, Michigan, for Appellees. **ON BRIEF**: John C. Scherbarth,

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OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The quest before us is whether the National Bank Act and regulations promulgated by the Office of the Comptroller of the Curren preempt Michigan banking laws concerning operating subsidiaries of nationally chartered banks.[1] The district cou held that the Michigan laws are preempted and granted summary judgment in favor of Wachovia. The State of

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[1] The specific Michigan laws at issue in this case are: (a) provisions requiring registration before a mortgage lender may conduct business in Michigan: MICH. COMP. LAWS § 445.1652(1), 445.1656(l)(d), 445.1 679(l)(a), 493.52(1), and 493 .53a(d); (b) provisions requiring the paym of fees on initial application for registration, or renewals thereafter: MI(COMP. LAWS § 445.1658, 445.1657(1), 493.54, and 493.56a(2); (c) provisions requiring that annual financial statements be submitted to the Commissioner and certain documents retained in a particular format: MICH. COMP. LAWS § 445.1657(2), 445.1671, 493.56a(2), and 493.56a(13); (d) provisions placing registrants under the "general supervision and control" of the Commissioner, with the power to condu examinations and investigations: MICH. COMP. LAWS §§ 445.1661,493.56b; (e) provisions permitting the Commissioner to investigate a complaint from any person if the appropriate federal regulatory authority is not pursuing it "adequately": MICH. COMP. LA § 445.1663; and (f) provisions allowing the Commissioner to take regulatory or other actions based on violations of the provisions set fort above: MICH. COMP. LAWS §§ 445.1665, 445.1666, 493.58-59, and 493.62a.

Michigan filed its notice of appeal on January 27, 2004. Since that time, the federal district court for the District of Maryland, and the United States Courts of Appeal for the Second and Ninth Circuits ruled on precisely the issue we address today. *See Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005); *Wells Fargo Bank v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *National City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005). Each of those courts held that the National Bank Act and the regulations promulgated by the Comptroller preempt conflicting state laws. Because we agree with the outcome and reasoning of those courts's decisions, we hold that the National Bank Act and the regulations at issue preempt the conflicting Michigan law. We further hold that the regulations do not violate the Tenth Amendment to the United States Constitution. We therefore affirm the district court's grant of summary judgment in favor of Wachovia.

I.

The parties agree that no material facts are disputed. Michigan has enacted a series of banking laws that are enforced by the defendant, the Commissioner of the Michigan Office of Insurance and Financial Services. As explained by the district court, two Michigan statutes are at issue. See MICH. COMP. LAWS § 445.1651 *et seq*. MICH. COMP. LAWS § 493.51 *et seq*. Pursuant to these statutes, Wachovia Mortgage must register with the State, but is not required to obtain a license to operate. *See* MICH. COMP. LAWS § 445.1652, 493.52. Moreover, Michigan's regulatory scheme permits it to investigate a specific consumer complaint if the complaint is not otherwise being pursued by the Comptroller. See MICH. COMP. LAWS § 445.1663(2) ("[T]he commissioner…shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory authority."). Finally, the Michigan statutes also require Wachovia to provide a financial statement annually, to pay an annual operating fee, to maintain certain documents, and to retain those documents for examination by

the Commissioner. *See* MICH. COMP. LAW §§ 445.1657(2 493.56a(2), 445.1658(1), 493.54, 445.1671, 493.68.

Wachovia Bank is a national banking association chartered under the National Bank Act, 12 U.S.C. § 21 *et seq* Wachovia Mortgage originally registered in Michigan to mal first mortgage loans as it does in various states. On January 1 2003, Wachovia Mortgage became a wholly owned operatin subsidiary of Wachovia Bank. After July 1, 2003, Wachovia Mortgage also began making second mortgage loans in Michigan.

On April 3, 2003, Wachovia Mortgage advised the State of Michigan that it was surrendering its lending registration in Michigan. The Commissioner responded by advising Wachovia Mortgage that effective July 1, 2003, Wachovia Mortgage would no longer be authorized to condu mortgage lending activities within the State. Wachovia then filed suit seeking a declaration that the Michigan statutes at issue are preempted by the National Banking Act and the Comptroller's regulations.

II.

We review a district court's decision to grant summa judgment de novo. *Bennett v. Eastpointe*, 410 F.3d 810(6th Cir. 2005). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law Fed. R. Civ. P. 56(c). The parties agree that no material fact are disputed and therefore only two legal issues are before th Court: (1) do the National Bank Act and the Comptroller's regulations preempt the Michigan laws' application to Wachovia and (2) do the Comptroller's regulations violate th Tenth Amendment to the United States Constitution? We answer yes to the first question and no to the second.

The National Bank Act was enacted in 1864 "to facilitate...a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (internal quotation omitted). Relevant to our discussion, the National Bank Act establishes nationally chartered banks and vests these banks with certain powers, including "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). To prevent state regulation of the national banking system, the Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law...." 12 U.S.C. § 484(a).

The Office of the Comptroller of the Currency is the federal administrative agency with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). Congress has authorized the agency to promulgate rules and regulations, and the agency may use its authority to define the "incidental powers" of national banks beyond those specifically enumerated in the Civil War era statute. See *Id.* at 258 ("[T]he business of banking is not limited to the enumerated powers in § 24 Seventh... [and] the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."); *see also* 12 U.S.C. § 93a. Drawing on its authority, the Comptroller has issued a regulation that, subject to certain exceptions, it has exclusive visitorial powers over national banks. 12 C.F.R. § 7.4000 (including the power to examine national banks, inspect their records, and regulate their activities authorized by federal law).

As Wachovia notes in its brief, additional regulations are relevant to this case. One such regulation is 12 C.F.R. § 5.34, providing that a "national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or

incidental to, the business of banking." 12 C.F.R. § 5.34(e)(*see also Wells Fargo Bank*, 419 F.3d at 960 (noting that "permitting operating subsidiaries does not expand the functions carried out by the banks"). Moreover, "[a]n operating subsidiary conducts activities authorized under thi section pursuant to the same authorization, terms, and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3). This reflects t Comptroller's view — held since the 1960s — that the pract of using an operating subsidiary to conduct the business of banking is an appropriate incidental power under 12 U.S.C. 24 (Seventh).

The federal regulation the State of Michigan argues most vehemently against was adopted in 2001 and promulga as 12 C.F.R. § 7.4006. It states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws appl to national bank operating subsidiaries to the same extent th those laws apply to the parent national bank." 12 C.F.R. § 7.4006. Michigan argues that the Comptroller exceeded its congressionally delegated authority by promulgating section 7.4006 because the regulation impermissibly expands the definition of "national bank." The State further argues that a federal regulatory agency cannot preempt state laws unless Congress has expressly and clearly manifested an intent for to do so.

Michigan's argument regarding preemption is "misdirected." *Fid. Fed. Say. & Loan Ass'n v. De la Cuesta* 458 U.S. 141 (1982). The type of preemption at issue in this case is "conflict preemption," which can arise where "state l stands as an obstacle to the accomplishment and execution c the f purposes and objectives of Congress." *Id.* at 153 (inter questions and citations omitted).[1] Michigan does not disput the fact that its regulatory scheme stands as an obstacle to th

[1] "Federal regulations have no less pre-emptive effect than federal statu *De la Cuesta*, 458 U.S. at 153.

National Banking Act and the relevant regulations promulgated by the Comptroller. Thus, the only question is whether the Comptroller "has exceeded [its] statutory authority or acted arbitrarily." *Id.* at 154. Contrary to Michigan's arguments, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Id.* at 154. Such a "narrow focus" is "misdirected." *Id.*[1]

We therefore decline Michigan's invitation to frame the issue as whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's and instead focus on whether the Comptroller has exceeded its authority or acted arbitrarily. We do so through the framework established by *Chevron US.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *see also NationsBank*, 513 U.S. at 257-58 (applying the *Chevron* doctrine to determine whether the Office of the Comptroller of the Currency was authorized to grant a national bank's application to sell annuities); *Boutris*, 419 F.3d at 958 (applying *Chevron* to answer exact question posed in this case); *Burke*, 414 F.3d at 315 (same). The district court appropriately conducted its analysis pursuant to *Chevron* and concluded that the regulations are within the Comptroller's authority and are a reasonable interpretation of the statute. We agree.

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[1] Michigan does correctly assert that there is a presumption against preemption in areas of regulation typically left to the states. "The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Flagg v. Yonkers Say. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005). Likewise, as the Ninth Circuit has noted, "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, creating an extensive federal statutory and regulatory scheme. The history of national banking legislation has been one of interpreting grants of both enumerated and incidental powers to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law." *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (internal quotation and citation omitted).

Under *Chevron*, we are confronted with two questior First, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *see al NationsBank*, 513 U.S. at 257 (asking "whether the intent of Congress is clear as to the precise question at issue"). If Congress's intent is clear, "that is the end of the matter. But the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's ansv is based on a permissible construction of the statute." *NationsBank*, 513 U.S. at 257 (internal quotation and citatio omitted). Any ambiguities require us to "give great weight any reasonable construction" of the statutes by the Comptroller. *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 40 (1987); see also *NationsBank*, 513 U.S. at 257; *De la Cuesta* 458 U.S. at 153-54.

We conclude that Congress has not spoken precisely the issue. Contrary to Michigan's arguments, the Comptroll regulations do not expand the definition of "national bank" Congress used it in section 484 to include an "operating subsidiary," such as Wachovia Mortgage. Rather, the regulations interpret a national bank's "incidental powers" under 12 U.S.C. § 24 (Seventh) to include the power to con business through an operating subsidiary. *See* 12 C.F.R. § 5 As the Comptroller explained in promulgating 12 C.F.R. § 7.4006, "operating subsidiaries have long been authorized f national banks and provide national banks with a convenien alternative to conduct activities that the bank could conduct directly." *See generally* Investment Securities; Bank Activi and Operations; Leasing, 66 Fed. Reg. 34,788 (July 2, 2001 (announcing final rule). Regulation section 7.4006 makes c that states cannot obstruct a national bank's power, granted it by Congress and federal regulations, to conduct "the busi of banking" through the use of operating subsidiaries, by imposing state laws and regulations on the subsidiaries that could not be imposed on the parent. *See Burke*, 414 F.3d at 316. Thus, "[t]o the extent that using an operating subsidia

a legitimate power granted to national banks, 12 U.S.C. § 484 provides the OCC with ample authority to preempt states from exercising visitorial powers over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers." *Id.* (citation omitted).

Furthermore, as noted above the National Bank Act was enacted in 1864. Operating subsidiaries were not recognized as a legitimate tool for carrying on the business of banking until the 1960s. *See* 69 Fed. Reg. 1895; Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,459 (Aug. 31, 1966). "Overall, the history of the banking laws indicates that operating subsidiaries have been treated distinctly by Congress and the OCC, and no statute speaks directly to the scope of federal versus state power over them." *Burke*, 414 F.3 d at 318. The Comptroller has the authority to define a national bank's "incidental powers" to include conducting the business of banking — in this case the making of first and second mortgage loans — through an operating subsidiary. Thus, Wachovia Bank itself can make first and second mortgage loans and it can also do so through an operating subsidiary such as Wachovia Mortgage. See 12 C.F.R. § 5.34. "Having so defined a national bank's power to conduct business through an operating subsidiary, the OCC further has the authority to preempt state law concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank." *Burke*, 414 F.3d at 318 (citing 12 C.F.R. §§ 7.4006, 34.1, 34.4); *see also* 12 U.S.C. § 93a.

Michigan and *amici* further argue that by including references to "affiliates" in other sections of the statute, but failing to do so in section 484, Congress unambiguously intended to exclude such entities from the visitation exception. Both courts to address this argument have denied it, *Boutris*, 419 F.3d at 959 n.12; *Burke*, 414 F.3d at 317-18, and we as well. Even assuming that the terms "operating subsidiary" and

"affiliate" are synonymous,[1] the argument fails. The absenc of any reference to operating subsidiaries does not convey th unambiguous intent of Congress. See *Boutris*, 419 F.3d at 95 n. 12. The statutes cited that include the term "affiliate" — section 161(c), section 371 c, section 371 c-i, and section 48 — establish the duties of a national bank to report on the activities of its affiliates and the bank's relationship with its affiliates. In order to be comprehensible, the statutes must mention "affiliates." This does not mean, however, that any statute that does not mention "affiliates" reflects the unambiguous intent of Congress to exclude them from the provision. If anything, it indicates that Congress has only included reference to affiliates in the limited cases where the must be distinguished from national banks. Michigan and a have pointed to no statutory sections that do not specifically pertain to the relationship between national banks and their affiliates that contain the term "affiliates" or "operating subsidiaries."

Thus, the only remaining determination pursuant to t *Chevron* analysis is whether the regulations are a reasonable construction of the statutory scheme. If the Comptroller's interpretation is reasonable, we must defer to its construction the statute. *See NationsBank*, 513 U.S. at 257. We reject Michigan's arguments and conclude that the Comptroller's regulations are a reasonable construction of the National Ba Act.

First, we do not find persuasive Michigan's argumen that the regulations disregard the principle of corporate separateness. Rather, the regulations merely recognize that decades national banks have been conducting the business o

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[1] The Second Circuit addressed this argument in great detail and found evidence that "operating subsidiaries" and "affiliates" are not co-termin *Burke*, 414 S.3d at 316-17. The opinion proceeded, however, to analyz two as if they were synonymous and concluded that there was no unambiguous intent. *Id.* at 317-18.

banking through operating subsidiaries. *See* 66 Fed. Reg. at 34,788 (" decades national banks have been authorized to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly."). The regulations, specifically section 7.4006, simply reflect the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not be hindered by conflicting state regulations. *See also Burke*, 414 F.3d at 319 ("Section 7.4006 reflects the OCC's policy judgment that national banks' use of operating subsidiaries as separately structured corporate entities is desirable and that it should not be hindered by state regulations."). This rationale was recognized as early as 1966 when the Comptroller explained: "The use of controlled subsidiary corporations provides national banks with additional options in structuring their businesses. National banks may desire to exercise such option for many reasons, including controlling operating costs, improving effectiveness of supervision...or separating particular operations of the bank from other operations." Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,460 (Aug. 31, 1966); see also Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 27, 1996); Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,908-09 (Mar. 10, 2000); *see also Boutris*, 419 F.3d at 960 (noting that "[t]he determination whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization, so long as the operating subsidiary form or organization cannot be used to evade the rules that apply to national banks."). *Chevron* requires us to defer to this reasonable interpretation.

We find no merit in the remainder of Michigan's arguments and hold that the Comptroller's regulations preempt conflicting Michigan laws. "[T]he OCC regulations reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference

with national banks' exercise of their powers under 12 U.S.C 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Bur* 414 F.3d at 321.

One final note regarding preemption: Michigan argu that should we affirm the district court's finding of preempti "Michigan would be precluded from protecting its citizens from any inappropriate actions taken by state incorporated nonbank subsidiaries of national banks that operate in the mortgage industry." Appellant's Br. at viii. As the Supreme Court has stated, courts "cannot resolve conflicts of authorit by our judgment as to the wisdom or need of either conflicti policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. Howe wise or needful [a state's policy],...it must give way to the contrary federal policy." *Franklin National Bank v. New Yor* 347 U.S. 373 (1954). Michigan's recourse (and the recourse for the other thirty attorney generals as amicus curiae) is wit Congress.

III.

Michigan also argues that 12 C.F.R. § 7.4006 violate the Tenth Amendment to the United States Constitution. We agree with the district court that Congress assumed the authority to regulate national banks under the Commerce Clause. The Tenth Amendment, reserving to the states those rights and powers not enumerated, is therefore, not implicat by the National Bank Act or lawfully promulgated regulatio thereunder.

IV.

For the previously stated reasons, we affirm the distr court's judgment granting summary judgment to Wachovia.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-2257

FILED
DEC 19 2005
LEONARD GREEN, Clerk

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,
Plaintiffs - Appellees,

v.

LINDA A. WATTERS, Commissioner of the Michigan Office of Insurance and Financial Services,
Defendant - Appellant.

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Lansing.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to appellees Wachovia Bank and Wachovia Mortgage is AFFIRMED.

ENTERED BY ORDER OF THE COURT
/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.

OPINION

Plaintiffs Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Company ("Wachovia Mortgage") (collectively "Wachovia") seek declaratory and injunctive relief to prohibit the Commissioner of the Michigan Office Insurance and Financial Services ("Commissioner") from attempting to interfere with the alleged exclusive visitorial rights of the Office of the Comptroller of the Currency ("OCC"). Plaintiffs contend that the state law restrictions at issue are preempted by the National Bank Act and by 0CC regulations promulgated pursuant to its authority under the Plaintiffs also contend that the State of Michigan's attempt regulate Wachovia Mortgage violates 42 U.S.C. § 1983. Plaintiffs' have moved for summary judgment.[1]

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[1] Briefs amici curiae have been filed by the OCC; the American Banke Association, America's Community Bankers, Consumer Mortgage

I.

Wachovia Bank is a national banking association chartered under the National Bank Act, 12 U.S.C. § 21 *et seq.* (Complaint ¶4). Wachovia Mortgage, previously named First Union Mortgage Corporation, originally registered to engage in the business of making first mortgage loans in Michigan under the Mortgage Brokers, Lenders and Servicers Licensing Act, Mich. Comp. Laws § 445.1656 *et seq.* On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Wachovia Mortgage is engaged in making first mortgaging loans in various states including Michigan. After July 1, 2003, Wachovia Mortgage also began to engage in the business of making secondary mortgage loans in Michigan.

On April 3, 2002, Wachovia Mortgage advised the State of Michigan that it was surrendering its lending registration for Michigan. The Commissioner responded with a letter advising Wachovia Mortgage that effective July 1, 2003, Wachovia Mortgage would no longer be authorized to conduct mortgage lending activities in Michigan. The Commissioner has not yet sought a cease and desist order in conjunction with its position that Wachovia Mortgage must register with the State of Michigan to engage in mortgage lending.

II.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for

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Coalition, Consumer Bankers Association, Electronic Financial Services Counsel, the Financial Services Roundtable, and Michigan Bankers Association ("American Bankers Association"); and the Attorney Generals of Forty States and District of Columbia ("State Attorneys General").

summary judgment the Court must look beyond the pleadin and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If Defendants carry their burden of showing there is an absence of evidence to suppo claim then Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on f that there is a genuine issue of material fact for trial. *Celote Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986).

"On summary judgment, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." *Hanover Ins. Co. v. American Engineering Co.*, 33 F.3d 727, 730 (6thCir. 1994) (citing *Matsushita*, 475 U.S. at 5 86-88). Nevertheles the mere existence of a scintilla of evidence in support of Plaintiffs position is not sufficient to create a genuine issue material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 252 (1986). The proper inquiry is whether the evidence is su that a reasonable jury could return a verdict for Plaintiff. *Id See generally, Street v. J. C. Bradford & Co.*, 886 F.2d 147 1476-80 (6th Cir. 1989).

III.

The issue before this Court is whether the State of Michigan through its Office of Insurance and Financial Services may exercise visitorial powers over state-chartered operating subsidiaries of national banks. Visitation, in law, the act of a superior or superintending officer, who visits a corporation to examine into the corporation's manner of conducting its business and to enforce laws and regulations. *First Union Nat'l Bank v. Burke*, 48 F. Supp.2d 132, 144 (D.Conn. 1999). In the context of national banking, visitori powers generally refer to the power to visit a national bank examine its activities and its observance of applicable laws, and encompass any examination of a national bank's record relative to the conduct of its banking business as well as an

enforcement action that may be undertaken for violations of law. *National City Bank of Indiana v. Boutris*, 2003 WL 21536818 (E.D. Cal. 2003). Generally, national banks are free from any state visitorial powers. *See* 12 U.S.C. § 484(a).

A. Michigan's Regulatory Scheme

The State of Michigan regulates the mortgage industry through two acts, the Mortgage Brokers, Lenders, & Servicers Licensing Act, MICH. COMP. LAW § 445.1651 *et seq.*, and the Secondary Mortgage Loan Act, MICH. COMP. LAW § 493.51 *et seq.* Under these statutes, Wachovia Mortgage is required to register with the State of Michigan, but is not required to obtain a license to operate in the state. *See* MICH. COMP. LAW § 445.1652, 493.52. Under Michigan's regulatory scheme, the state reserves the option to investigate a specific consumer complaint if the complaint is not otherwise being pursued by the OCC. *See* MICH. COMP. LAW § 445.1663(2) ("the commissioner...shall make no investigation of the complaint if the complaint is being adequately pursued by the appropriate federal regulatory authority."). The Michigan statutes also require a registrant to provide a financial statement annually, to pay an annual operating fee, to maintain certain documents, and to retain those documents for examination by the Commissioner. *See* MICH. COMP. LAW § 445.1657(2), 493.56a(2), 445.1658(1), 493.54, 445.1671,493.68.

B. The National Regulatory Scheme

National banks are federally chartered institutions created and governed by the National Bank Act ("the Act"), 12 U.S.C. § 21 *et seq.* Under the Act, national banks have the authority to receive deposits, loan money and exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. Further, national banks are authorized to make, arrange and deal in loans secured by interests in real estate. 12 U.S.C. § 371. Under the Act, national

banks are generally free from state visitorial powers. Sectior 84(a) provides that:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised by Congress or by either House thereof or by any committee of Congress or of either House duly authorized. 12 U.S.C. § 484(a).

The National Bank Act is also the OCC's enabling statute, providing the OCC with broad supervision and enforcement power over national banks authorized under the Act. *See NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995). Pursuant to this authority, th OCC has promulgated additional regulations pertaining to national bank operating subsidiaries. OCC regulations provic that a national bank may conduct through an operating subsidiary activities that are permissible for a national bank. C.F.R. § 5.34(e)(l). In addition, the regulations provides tha an operating subsidiary is subject to the OCC's visitorial authority to the same extent as a national bank. 12 C.F.R. § 5.34(e)(3). OCC regulations also provide that "[s]tate laws apply to national bank operating subsidiaries to the same ext that those laws apply to the parent national bank." 12 C.F.R. 7.4006. Because § 484 prevents state visitorial authority to l exercised over national banks, the regulations extend this prohibition to national bank operating subsidiaries.

C. The Chevron Analysis

The Commissioner argues that the OCC exceeded its authority by promulgating 12 C.F.R. § 7.4006, the regulatior limiting the application of state laws to national bank operati subsidiaries to the same extent as they apply to national banl The Commissioner contends that this regulation impermissil expands the definition of "national bank" contrary to 12 U.S

§ 221 and 221a. Thus, this Court must apply the *Chevron* test to review the agency's construction of the statute. *See Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Under the *Chevron* test, a court, reviewing an agency's construction of a statute which it administers, is confronted with two questions. *Id.* First, the court must determine whether Congress has directly spoken on the precise question at issue. *Id.* If Congress' intent is clear, then the court as well as the agency must give effect to the unambiguous intent of Congress. *Id.*

If, however, the statute is silent or ambiguous with respect to the specific issue, the court must determine whether the agency's interpretation is based on a permissible construction of the statute. The fact that the regulation reviewed carries preemptive force does not alter this analysis. The reasonableness of the regulations does not depend on express congressional authorization to displace state law. See *Fidelity Fed. Say. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). Because Wachovia and the Commissioner concede that Congress has not spoken on the instant question, this Court proceeds to determine whether the agency's interpretation is based on a permissible construction of the statute.

The Commissioner contends that the regulation impermissibly expands the definition of "national bank" to include state-chartered operating subsidiaries. Sections 221 and 221 a set out definitions for the Federal Reserve System. Under Section 221a, an "affiliate" includes any non-bank corporation controlled or owned by a national bank. In conjunction, Section 481 provides for the examination of any national bank and its affiliates. 12 U.S.C. § 481. In contrast, Section 484 provides the 0CC with exclusive visitorial powers over national banks. The Commissioner contends § 484's

silence as to affiliates prevents the section from being applie to state-chartered operating subsidiaries.

The National Bank Act was enacted in the Civil War era. Clearly, at that time, operating subsidiaries were not contemplated as tools of national banks to carry out the business of banking. Only many decades later, in the 1960's operating subsidiaries were acknowledged as a legitimate m for national banks to conduct banking. 69 F.R. 1895. Sectio 484's silence does not compel a specific result, it merely requires the application of the second step of the *Chevron* analysis. In addition, Section 484 is not the sole determinant the agency's authority over Wachovia Mortgage. Section 24 Seventh which provides national banks powers incidental to business of banking provides additional authority for the OC regulations.

State Attorneys General, on behalf of the Commissioner, also argue that the OCC regulation at issue exceeds the agency's authority under 12 U.S.C. §§ 371(a) a 93a. Section 371(a) permits the OCC to issue rules imposin additional restrictions and requirements on real estate loans. State Attorneys General contends that 12 §1828(o), which provides a criteria for uniform real estate lending standards, limits § 371(a)'s ability to impose restrictions that preempt state law. Under OCC regulation, one of the uniform lendi standards requires national bank to adopt policies in compliance with all real estate related laws and regulations. C.F.R. Part 34, Subpart D. App. A. On the basis of this regulation, State Attorneys General contend that Congress' subsequent passage of the Riegle Neal Act was premised or belief that states had the authority to regulate real estate loa made by national banks. Section 1828(o), however, does n require compliance with state laws. Arguably, the regulatio promulgated by the OCC allows for such compliance.

Lastly, State Attorneys General argue that the OCC does not possess any independent power to preempt state laws under 12 U.S.C. § 93a. Section 93a provides:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office except that the authority conferred by this section does not apply to section 36 of this title [the McFadden Act, which makes the power of national banks to branch subject to state law] or to securities activities of National Bank under the Act commonly known as the "Glass-Steagall Act."

12 U.S.C. § 93a. They contend that the OCC has no authority to promulgate 12 C.F.R. § 7.4006 because the statute does not expressly grant the OCC the power to promulgate regulations that preempt state law. State Attorneys General contend that under § 93a, the OCC cannot grant powers to national banks that they do not already possess under federal statutory law. Section 93a contains a broad grant of authority to promulgate regulations, including those that preempt state laws. *See Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) ("the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act."). More importantly, an express Congressional authorization to displace state law is not required. *See Fidelity Fed. Sav. & Loan*, 458 U.S. at 154.

The OCC holds broad and pervasive authority to regulate national banking associations. Under 12 U.S.C. § 1818, the OCC has the authority to conduct surveillance of national banks' compliance with any "law, rule, or regulation,

or any condition imposed in writing by the agency," and to prevent any "unsafe or unsound practice" on the part of the bank. Under § 484, OCC maintains exclusive visitorial authority over national banks. Lastly, the OCC's authority extends to the regulation of national banks' powers that are incidental to the business of banking. *See* 12 U.S.C. § 24 Seventh. In light of this statutory authority, it was within the OCC's authority to promulgate 7.4006.

B. Preemption

The Commissioner also contends the federal regulati should not preempt Michigan law because they do not confl The Commissioner argues that many of her visitorial power: cannot be exercised against a registrant under Michigan law In addition, the Commissioner argues that a specific consur complaint is pursued only if it is not otherwise being pursue by the OCC. MICH COMP. LAWS § 1663(2).

A state cannot regulate a national bank where doing would prevent or significantly interfere with the national bank's exercise of its powers. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33-34 (1996). Even where Congress has not completely displaced state regulatic in a specific area, state law is nullified to the extent that it actually conflicts with federal law. *See Fidelity Fed. Say. & Loan*, 458 U.S. at 153. Such a conflict arises when state lav stands as an obstacle to the accomplishment and execution (the full purposes and objectives of Congress. *Id.* The relati importance to the State of its own law is not material when there is a conflict with a valid federal law. *Id.* Federal regulations have no less preemptive effect than federal statu *Id.*

The Commissioner understates the impact of the Michigan statutes. Under the Michigan statutes, Wachovia Mortgage must register, pay annual fees, file a financial

statement annually, and submit to the Commissioner's general supervision and control. These requirements clearly interfere with its national bank powers to conduct the business of banking. *See* 12 U.S.C. 24 Seventh. Even the most limited aspects of state licensing requirements have been preempted because they created impermissible conditions upon the authority of a national bank to do business. *See Association of Banks in Insurance, Inc. v. Duryee*, 55 F. Supp.2d 799, 812 (S.D. Ohio 1999), aff'd 270 F.3d 397 (6th Cir. 2001).

Preemption depends on the reasonableness of the OCC's interpretation of the statute, not on the merits of the state law policy underlying its regulatory scheme. Although Commissioner and State Attorneys General have raised legal challenges to the OCC regulation, the essence of their arguments have relied on the policy considerations which weigh in favor of state authority to regulate companies who conduct mortgage operations within its borders. A challenge based on the wisdom of an agency or the competing policy of the states must fail. See *Chevron* at 866. It is not for this Court to weigh the relative merits of Michigan's state laws designed to protect mortgage consumers. *See Franklin Nat'! Bank v. New York*, 347 U.S. 373 (1954). Although the State of Michigan maintains an interest in protecting its citizens, those compelling policy reasons do not undermine the reasonableness of the OCC' s regulation.

C. The Tenth Amendment

The Commissioner argues that 12 C.F.R. § 7.4006 violates the Tenth Amendment because it essentially federalizes a state corporation by converting it into an instrumentality of federal law. In *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), the Supreme Court held that a federal law violated the Tenth Amendment to the extent that it permitted the conversion of state associations into federal ones in contravention of the laws of their place of creation. In *Hopkins*, a federal law permitted a state savings

and loan to convert into a federal entity with the approval of simple majority of shareholders. *Id.* T[illegible] law was in contravention of state corporate law, which had different requirements for winding up a state corporation. *Id.*

Unlike Hopkins, Congress assumed authority to regulate national banks under the Commerce Clause. The Tenth Amendment reserves to the states those rights not enumerated. *See* U.S. CONST. AMEND X. Because the Congress was at liberty to exercise this power under the Commerce Clause, the Tenth Amendment is not implicated.

D. 42 U.S.C. § 1983

Wachovia requests damages under 42 § 1983. In orc to prevail under § 1983, the claim must meet three criteria, (that Congress intended the provision in question to benefit t plaintiff; (2) that the right protected by the statute is not so vague or amorphous that its enforcement would strain judici competence; and (3) that the statute unambiguously impose: binding obligation on the States. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Wachovia argues that 12 U.S.C. § Seventh statute expressly grants a power, that the power is r so amorphous, and that the power is granted in mandatory a affirmative terms.

Wachovia's right based upon incidental powers is nc right cognizable under § 1983. Under § 1983, the violation must redress a violation of a federal right, not merely a violation of federal law. *Blessing* at 340. The incidental powers of § 24 Seventh do not establish an unambiguously conferred right to be free from state visitorial authority. It i: 484 which extends the OCC' s exclusive visitorial authority national bank operating subsidiaries. This section, however extends authority to the OCC, it does not grant a right to a national bank. The OCC regulatory scheme was "intended primarily for the benefit of the public and the commonwealt

ıot for the benefit of banks and bank directors." *See In re Franklin Nat. Bank Securities Litigation*, 445 F. Supp. 723, 731 (D.C.N.Y. 1978) (reviewing the effect of visitation under § 1981). Thus, Wachovia's § 1983 claim must fail.

IV.

For the previously stated reasons, Wachovia's motion for summary judgment will be granted in part and denied in part and an order will be issued in accordance with this opinion.

Date: August 30, 2004

/s/
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official
capacity as Commissioner of the Michigan Office of Insurar
and Financial Services,

Defendant.

JUDGMENT

In accordance with the opinion and order entered August 30, 2004,

IT IS HEREBY ORDERED that **JUDGMENT** is entered in favor of plaintiffs Wachovia Bank, N.A. and Wachovia Mortgage Corporation.

Date: August 31, 2004 /s/ Robert Holmes Bell

ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WACHOVIA BANK, N.A. and
WACHOVIA MORTGAGE CORPORATION,

Plaintiffs,

File No. 5:03-CV-105

v.

HON. ROBERT
HOLMES BELL

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services,

Defendant.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (Docket # 15) is **GRANTED** in part and **DENIED** in part.

Plaintiff's claim for declaratory and injunctive relief is **GRANTED** and Plaintiff's claim under 42 U.S.C. § 1983 is **DENIED**.

Date: August 30, 2004 /s/ Robert Holmes Bell

ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

Case No: 04-2257

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
JAN 18 2006
LEONARD GREEN, Clerk

WACHOVIA BANK, N.A.; WACHOVIA MORTGAGE C(

Plaintiffs – Appellees

v.

LINDA A. WATTERS, in her official capacity as Commissioner of the Michigan Office of Insurance and Financial Services

Defendant – Appellant

STATE OF IOWA; COMPTROLLER OF THE CURRENC
AMERICAN COMMUNITY
OF BANKERS; CONSUMER MORTGAGE COALITION;
FINANCIAL SERVICES
ROUNDTABLE; MICHIGAN ASSOCIATION OF
REALTORS; NATIONAL ASSOCIATION
OF REALTORS

Amici Curiae

BEFORE: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

Upon consideration of the petition for rehearing filed the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk